Supreme Court, U. S.
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No. 79-1361

In the Supreme Court of the United States

October Term, 1979

John J. Beattie, Petitioner

v.

United States of America, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINETH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

JOHN JAY BEATTIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEAL FOR THE NINTH
CIRCUIT

The petitioner JOHN HAY BEATTIE respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered February 4, 1980.

OPINION BELOW

The Court of Appeals filed its opinion on February 4, 1980. A copy of the opinion is attached as the Appendix.

JURISDICTION

Jurisdiction of the Court is invoked under Title 28, United States Code, Section 1251(1).

QUESTIONS PRESENTED FOR REVIEW

DOES THE ALLEN INSTRUCTION, TAKEN FROM ALLEN V. UNITED STATES (1896) 164 U.S. 492, GIVEN SUA SPONTE BY THE TRIAL COURT, CONSTITUTE A DENIAL OF THE RIGHT TO DUE PROCESS SET FORTH IN THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE RIGHT TO A UNANIMOUS VERDICT OF TWELVE JURORS BASED SOLELY ON THE EVIDENCE PRESENTED AT TRIAL AND THE APPLICABLE LAW?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment:

No person shall be held to answer for a

capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On February 13, 1978, an indictment was filed in the United States District Court charging JOHN JAY BEATTIE, among others, with eleven counts of violation of 18 U.S.C., Section 1341 (using the mail to commit fraud) and one count of violation of 18 U.S.C., Section 371 (conspiracy to use mails to commit fraud.). On May 22, 1978, a jury

trial commenced in the above-entitled Court, the Honorable Robert H. Schnake, presiding on the indictment referred to herein with the exception of Count Two, which earlier had been dismissed by the Court. Trial was held between May 22 and May 30, 1978. On May 30, 1978, the Court instructed the jury, concluding at 3:40 P.M. Further facts as stated by the Court of Appeal and are summarized below.

The jury began deliberating at 3:40 P.M. on May 30, 1978, following four days of prosecution and defense presentations, including the testimony of more than 20 witnesses and the introduction of numerous exhibits. After deliberating for one hour, the jury recessed for the night. Deliberations continued throughout the day on May 31, with the jury returning to the court once to be reinstructed on the elements of mail fraud, and once to hear the testimony of a prosecution witness read from the record. The following morning, after two hours of deliberation, the jury submitted four questions to the district judge concerning substantive elements of the offense charged and proper procedures for reaching a verdict. After responding to these questions, the district judge asked the jury if they were in agreement on any count

of the indictment. When the foreman indicated that they were not, the judge made the following statement to the jury:

> Just a word or two about approaching your task.
>
> It frequently develops that a jury may be evenly divided where half of you think there's reasonable doubt, the other half see so reasonable doubt. I'd suggest in a case like that, if half or almost half of you have doubts about the proof, that those who have no doubts would wonder if they were right to be as certain as they are when a substantial number of other jurors seem to find doubts about the sufficiency of the evidence.
>
> Conversely, it would seem to me that if only one or two had doubts, that they should reappraise those doubts and consider the views of the fellow jurors and decide whether those doubts are reasonable when so many of their fellow jurors don't see them as reasonable doubt.
>
> This is simply a method of re-examining your views about the case and it is without any intention of the Court to suggest that anyone should give up an honestly held conviction about the weight and sufficiency of the evidence. But you will recall I did tell you that it would be desirable, from time to time, to reappraise your views, to consider the impact on your views and the views of your fellow jurors and to change you views from time to time if you thought it appropriate to do so.
>
> But always remember that it is your conscientious view about the evidence

> that must control and you don't give up a conscientiously held view solely for purposes of arriving at a verdict, although, as I say, it is highly desirable that there be a verdict on all or substantially all of the counts or at very least on some of the counts.
>
> Any other questions that you wanted to raise now? All right. You will resume your deliberations. We will be at your call.

Five hours later, following a one and one-half hour lunch break and three and one-half hours of deliberation, the jury returned a guilty verdict, finding JOHN JAY BEATTIE guilty on five counts of mail fraud and one count of conspiracy to commit mail fraud.

REASONS FOR GRANTING THE WRIT

The historical basis for the use of the so-called dynamite instruction in Allen, has been its proven ability to produce verdicts from juries which believe themselves deadlocked. (United States v. Bailey, [5th Cir. 1972] 468 F.2d 652, at 666).

However, since the decision of the United States Supreme Court in Allen in 1896, the elements of this instruction have been reviewed by numerous circuits of the United States Court of Appeals and by many state courts.

The legality and constitutional bases of the instruction have been severely challenged, and, at this time, there is a total divergence of views as tc the acceptability of the Allen instruction which can only be resolved by the United States Supreme Court.

The Third, Seventh, and District of Columbia Circuits of the United States Court of Appeals have disapproved the elements of this instruction. (See United States v. Fioravanti, [3rd Cir. 1969] 412 F.2d 407, cert. denied sub nom. Panaccione v. United States [1969] 396 U.S. 837 [24 L.Ed.2d 88, 90 S. Ct. 97]; United States v. Brown, [7th Cir. 1969] 411 F.2d 930; and United States v. Thomas [D.C. Cir. 1971] 449 F.2d 1177, [146 App. D.C. 101].)

In United States v. Fioravanti, supra, for example, the Third Circuit, characterizing use of the Allen charge as "an invitation for perennial appellate review," outlawed prospectively the "majority-minority" instruction partly because of "the profound difficulty in confining its use within just and equitable bounds," and recommended a model similar to the ABA-endorsed instruction for use by judges disposed to charge jurors on consultation inter sese. In United States v. Brown, supra, the Seventh

Circuit, influenced by the administrative difficulties associated with Allen-type charges, decided that "it would serve the interests of justice to require under our supervisory power that, in the future, district courts within this Circuit when faced with deadlocked juries comply with the 'American Bar Association' standard. In United States v. Thomas, supra, the District of Columbia Circuit in its exercise of its supervisory power over the administration of the law in the circuit, rejected Allen-type instructions and adopted the American Bar Association standard. One of the principal reasons for rejecting Allen or Allen-type instructions was the finding by the Court in Thomas that Judge (now Chief Justice) Burger's plea in Fulwood v. United States (1966) 369 F.2d 960, 125 U.S. App. D.C., cert. denied, (1967) 387 U.S. 934, 87 S. Ct. 2058, 18 L.Ed.2d 996, that the trial bench should "consistently use a form of instruction plainly within Allen" had not been followed. "The cases which have subsequently come before this court attest vividly the fact that this has not been done. And, of course, adherence even precisely to the charge as approved in Allen would not alone solve this problem, for there would continually remain questions as to whether

in the particular circumstances involved the giving of an Allen-type charge was legally warranted." United States v. Thomas (D.C. Cir. 1971) 449 F.2d 1177, at 1187-1188, fn. 78.

Moreover, twenty-three state courts have also disapproved Allen or Allen-type instructions in whole or in part. These jurisdictions include: Fields v. State (Alaska 1971) 487 P.2d 831; State v. Thomas, (1959) 86 Ariz. 161, [342 P.2d 197]; Taylor v. People, (1971), 176 Colo. 316, [490 P.2d 292]; Bryan v. State, (Fla.App. 1973) 280 So.2d 25; State v. Brown, (1971), 94 Idaho 352, [487 P.2d 946]; People v. Mills, (1971), 131 Ill.App.2d 693, [268 N.E.2d 571]; State v. Nicholson, (La. 1975), 315 So.2d 639; State v. White, (Me. 1972), 285 A.2d 832; People v. Sullivan, (1974), 392 Mich. 324, [220 N.W.2d 441]; State v. Martin, (1973), 297 Minn. 359, [211 N.W.2d 765]; State v. Randall, (1960), 137 Mont. 534, [353 P.2d 1054, 100 A.L.R.2d 171]; State v. Garza, (1970), 185 Neb. 445, [176 N.W.2d 664]; Azbill v. State, (1972), 88 Nev. 240, [495 P.2d 1064]; State v. Blake, (1973), 113 N.H. 115, [305 A.2d 300]; State v. Minns, (1969), 80 N.M. 269, [454 P.2d 355]; State v. Champagne, (N.D. 1972), 198 N.W.2d 218; State v. Marsh, (1971), 260 Ore. 416,

[490 P.2d 491], cert. denied sub.nom. O'Dell v. Oregon, (1972), 406 U.S. 974, [32 L.Ed.2d 674, 92 S.Ct. 2420]; People v. Gainer, (Cal. 1977), 19 C.3d 835, 139 Cal.Rptr. 861; Commonwealth v. Spencer, (1971), 442 Pa. 328, [275 A.2d 299]; State v. Patriarca, (1973), 112 R.I. 14, [308 A.2d 300]; Kersey v. State, (Tenn. 1975), (525 S.W.2d 139); Kelley v. State, (1971), 51 Wis.2d 641, [187 N.W.2d 810]; and Elmer v. State, (Wyo. 1969), 463 P.2d 14.

In discussing Allen instructions, for example, the Supreme Court of California has stated:

> "The Allen case from which the instruction takes its name is a most unprepossessing leading authority. Alexander Allen was a 14-year-old boy who had been convicted of murder. His conviction was reversed by the United States Supreme Court because of a faulty jury instruction (Allen v. United States (1893) 150 U.S. 551 [37 L.Ed. 1179, 14 S.Ct. 196]), and after a retrial his second conviction was reversed by the Supreme Court because of another erroneous instruction (Allen v. United States (1895) 157 U.S. 675 [39 L.Ed 854, 15 S.Ct. 720]). After a third conviction his case went again to the Supreme Court. (Allen v. United States (1896) 164 U.S. 492 [41 L.Ed 528, 17 S.Ct. 154]). No counsel appeared for Allen, and the court declared itself "somewhat embarrassed....by the absence of a brief on the part of the plaintiff in error...." (Id. at p. 494 [41 L.Ed at p. 528].) Nevertheless, the court did consider 18 assignments of error in the record, the last 2 of which concerned the instruction now known as the "Allen charge." The court noted that the instruction was "taken literally from a charge in a criminal case which was

approved of by the Supreme Court of Massachusetts in Commonwealth v. Tuey, 8 Cush. 1...." (Id. at p. 501 [41 L.Ed. at p. 531].)....

Given this procedural history, and the Allen court's brief treatment of the elaborately crafted collection of nuances and intimations composing the challenged instruction, "there is little wonder that many doubt whether the case would not be decided differently today. [Citation.] But that it should have become the foundationstone of all modern law regarding deadlocked juries is perhaps the greatest anomaly of the Allen case." (United States v. Bailey (5th Cir. 1972) 468 F.2d 652, 666.)....

In evaluating the charge we also consider its treatment in recent decisions of other jurisdictions. There we find that Allen-type instructions have been subjected to a withering barrage of attacks, largely on the grounds they are coercive or inaccurate. Although no opinion of the United States Supreme Court has addressed a challenge to this charge since the original Allen case, 3 federal circuits and at least 22 states have disapproved the instruction. The American Bar Association has recommended abandonment of the charge. Moreover, many decisions which tolerate continued use of the charge have done so grudgingly under compulsion of stare decisis (e.g., U.S. v. Bailey (5th Cir. 1972), supra, 468 F.2d 652, 669, affd. (1973) 480 F.2d 518), or have sought to place curbs on its use. These restrictions often take the form of limiting the charge to the original language approved in Allen (see, e.g., United States v. Flannery (1st Cir. 1971) 451 F.2d 880, 883; United States v. Kenner (2d Cir. 1965) 354 F.2d 780, 782-784; United States v. Rogers (4th Cir. 1961) 289 F.2d 433), or requiring "balancing" instructions (see, e.g., Flannery, supra, at p. 883; Note, On Instructing Deadlocked Juries (1968) 78 Yale L.J. 100, 106, fn. 26, and cases cited). In short, the indisputable modern trend is to abandon Allen (U.S. v. Bailey (5th Cir. 1972), supra, 468 F.2d 652, 668), and an examination of the impact of each of the crucial elements which may be found in Allen-type

charges demonstrates the persuasive justification for that sentiment....

The Allen charge, to the extent it still survives, has been preserved because it is deemed to be an effective device for producing verdicts from otherwise deadlocked juries. However, it achieves such efficacy as it may have through a subtle mixture of inaccuracy and impropriety, in a manner which can dramatically distort the fact-finding function of the jury in a criminal case. Ultimately, even the saving of judicial resources, which has been the main justification for its continued existence, is outweighed by the burden the charge imposes on the appellate courts. To borrow the words uttered for a defendant who has long since lost his appeal, in criminal trials an Allen-type instruction "should never again be read in a California courtroom." (People v. Smith, supra, 38 Cal.App.3d 401, 406.)"

Beople v. Gainer (1977) 19 C.3d 835, 139 Cal.Rptr. 861, 566 P.2d 977 (footnotes omitted; emphasis in original).

While the Ninth Circuit of the United States has approved the Allen charge in part and has not joined with other circuits which have held such an instruction to be error per se, the Court does recognize nevertheless the possibility of error attendant with the use of the instruction, requiring thereby a time-consuming, case-by-case examination of the instruction "in its context and under all the circumstances" to see if it had a coercive effect upon the jury. Opinion, page 4.

The Ninth Circuit has elsewhere stated in Sullivan v. United States (1969) 414 F.2d 714, 716, that:

> "We doubt that it is really any longer advisable to give Allen instruction at all, and it certainly should be given only when it is apparent to the District judge, from the jury's conduct on the length of its deliberations that it is clearly warranted."

In response to the severe criticism of Allen by federal and state courts, the legal profession, leading scholars in the field, and the American Bar Association (ABA) have recommended that the Allen instruction should be abandoned. In so recommending, the ABA has promulgated the following standard to be used in place of Allen:

> 5.4 Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
> (i) that in order to return a verdict, each juror must agree thereto;
> (ii) the jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement. (ABA Project on Minimum Standards for Criminal Justice, Stds. Relating to Trial by Jury [Approved Draft 1968] std. 5.4).

If the charge is to be given, however, the American Bar Association has suggested a form to be given before the jury retires and repeated later if necessary:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

American Bar Association Project on Minimum Standards for

Criminal Justice, Standards Relating to Trial by Jury, Commentary to § 5.4 (1968). This form has been adopted in two Circuits, and has been approved in substantially the same form in four others. (See United States v. Silvern (7th Cir. 1973) 484 F.2d 879, 883; United States v. Thomas (D.C. Cir. 1971) 449 F.2d 1177; United States v. Angiulo (1st Cir. 1973) 485 F.2d 37; United States v. Skillman (8th Cir. 1971) 442 F.2d 542; United States v. Fioravanti (3d Cir. 1969) 412 F.2d 407; and Webb v. United States (5th Cir. 1968) 398 F.2d 727.)

CONCLUSION

The decision of the Ninth Circuit Court of Appeal in the case below is in direct conflict with the decisions of other circuits and at least 23 states. The use of an Allen instruction, although effective in producing verdicts from otherwise deadlocked juries, is inaccurate, improper, unfair, and constitutionally impermissible. In the words of one scholar:

> "The Allen charge is coercive, unfair to defendants, an inaccurate statement of the law, and might well be unconstitutional if the Supreme Court ever chooses to reconsider the matter. Nevertheless, deadlocked juries are a fact of life which cannot be swept aside.

> Something is needed to assist the deadlocked jury. The jurors may be at loose ends during deliberations, but often they could be persuaded in a legitimate fashion to reach a verdict. What is needed is the instruction based upon the ABA standard. This standard will have the effect of aiding the jury in an evenhanded and lawful way. In addition to the growing legion of courts to adopt it, other courts, including the United States Supreme Court, should take a fresh and favorable look at the ABA standard. The time has come for the dynamite charge to be permanently defused.

Marcus, The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to Be Permanently Defused? 43 Missouri LR 613, 641 (Fall, 1978).

For these reasons, the petition for certiorari should be granted to resolve this issue of constitutional magnitude about which federal circuits and state jurisdictions profoundly disagree and which can only be resolved by the United States Supreme Court. Certainly, the time is ripe for abandoning the Allen instruction, replacing it with one, such as the ABA standard, which protects the rights of criminally accused and at the same time requires conscientious deliberations by all members of the jury.

DATED: March 3, 1980. Respectfully submitted,

ALEXANDER ANOLIK
Attorney for Appellant
John Jay Beattie

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- JOHN JAY BEATTIE, Defendant-Appellant.	)	No. 78-2381 O P I N I O N

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and WALLACE, Circuit Judges,
and CURTIS,* District Judge

WALLACE, Circuit Judge:

A jury found Beattie guilty on five counts of mail fraud, 18 U.S.C. § 1341, and one count of conspiracy to commit mail fraud, 18 U.S.C. § 371. Beattie appeals his conviction, claiming that the trial judge erred when he instructed the jury, sua sponte, in a manner similar to that approved in Allen v. United States, 164 U.S. 492 (1896). That instruction, Beattie claims, coercively produced the guilty verdict and deprived him of a fair trial. We reject his claim and affirm the conviction.

*Honorable Jesse W. Curtis, United States District Judge, Central District of California, sitting by designation.

The jury began deliberating at 3:40 p.m. on May 30, 1978, following four days of prosecution and defense presentations, including the testimony of more than 20 witnesses and the introduction of numerous exhibits. After deliberating for one hour, the jury recessed for the night. Deliberations continued throughout the day on May 31, with the jury returning to the court once to be reinstructed on the elements of mail fraud, and once to hear the testimony of a prosecution witness read from the record. The following morning, after two hours of deliberation, the jury submitted four questions to the district judge concerning substantive elements of the offense charged and proper precedures for reaching a verdict. After responding to these questions, the district judge asked the jury if they were in agreement on any count of the indictment. When the foreman indicated that they were not, the judge made the following statement to the jury:

> Just a word or two about approaching your task.
>
> It frequently develops that a jury may be evenly divided where half of you think there's reasonable doubt, the other half see no reasonable doubt. I'd suggest in a case like that, if half or almost half of you have doubts about the proof, that those who have no doubts would wonder if they were right to be as certain as they are when a substantial number of other jurors seem to find doubts about the sufficiency of the evidence.

> Conversely, it would seem to me that if only one or two had doubts, that they should reappraise those doubts and consider the views of the fellow jurors and decide whether those doubts are reasonable when so many of their fellow jurors don't see them as reasonable doubt.
>
> This is simply a method of re-examining your views about the case and it is without any intention of the Court to suggest that anyone should give up an honestly held conviction about the weight and sufficiency of the evidence. But you will recall I did tell you that it would be desirable, from time to time, to reappraise your views, to consider the impact on your views and the views of your fellow jurors and to change your views from time to time if you thought it appropriate to do so.
>
> But always remember that it is your conscientious view about the evidence that must control and you don't give up a conscientiously held view solely for purposes of arriving at a verdict, although, as I say, it is highly desirable that there be a verdict on all or substantially all of the counts or at very least on some of the counts.
>
> Any other questions that you wanted to raise now? All right, You will resume your deliberations. We will be at your call.

Five hours later, following a one and one-half hour lunch break and three and one-half hours of deliberation, the jury returned a guilty verdict.

The primary reason for judicial disfavor of an Allen charge such as that delivered in this case is its

pontentially coercive effect upon those members of a jury holding to a minority position at the time of the instruction. United States v. Fioravanti, 412 F.2d 407, 416-17 (3d Cir.), cert. denied, 396 U.S. 837 (1969); Note; Due Process, Judicial Economy and the Hung Jury: A reexamination of the Allen charge, 53 Va. L. Rev. 123, 126 (1967). It is contended that the Allen charge persuades minority jury members to alter their individually held views not on the basis of evidence and law, but on the basis of majority opinion.

We have in countless cases approved an Allen charge, e.g., United States v. Guglielmini, No. 77-3758, 77-3759 (9th Cir., Feb. 5, 1979); United States v. Hardy, 454 F.2d 885 (9th Cir. 1971), cert. denied, 409 U.S. 846 (1972); United States v. Moore, 429 F.2d 1305 (9th Cir. 1970); Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969), Dearinger v. United States 378 F.2d 346 (9th Cir.), cert. denied, 389 U.S. 885 (1967), and thus do not join other circuits which have held such an instruction to be error per se. See cases cited, United States v. Contreras, 463 F.2d 773, 774 n.2 (9th Cir. 1972). Rather, our approach has been to determine if the instruction, when challenged, improperly affected the jury verdict. Thus, to determine the propriety of the trial court's use of an

Allen charge in this case, we must examine the instruction "in its context and under all the circumstances" to see if it had a coercive effect upon the jury. Jenkins v . United States, 380 U.S. 445, 446 (1965); United States v. Seawell, 583 F.2d 416, 418 (9th Cir.), cert. denied, 439 U.S. 991 (1978); Marsh v. Cupp, 536 F.2d 1287, 1290 (9th Cir.), cert. denied, 429 U.S. 981 (1976).

Beattie contends that our decision is controlled by United States v. Contreras, supra, 463 F.2d 773. There, the trial court gave the jury an Allen charge after eight hours of deliberation and prior to any specific indication in the record that they were unable to reach a verdict. We held that the charge was premature and coercive. Id. at 774. Here, the jury had also deliberated for eight hours before receiving the charge and had not stated to the trial judge that they were deadlocked. The similarity of these facts to those of Contreras would suggest that here, as there, an Allen chargewas premature. We have observed, however, that jury difficulty in reaching a verdict, sufficient to warrant an Allen charge, may be shown other than by specific statements

from the jury. For example, a jury deliberating eight hours on a very simple factual issue may in itself show such difficulty. See Sullivan v. United States, supra, 414 F.2d at 716 (Allen instruction "should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted") (emphasis added).

Thus, while the Contreras decision does not focus on the factors that led it to the determination that an Allen charge was premature there, we could conclude that the district judge here did not err in apparently concluding that the jury was sufficiently "deadlocked," based on the time of deliberation and the fact that they had returned to the court three times for further instructions and rehearing of testimony. We need not, however, reach that question because even if it were premature, we would not reverse unless the charge was also coercive. United States v. Scruggs, 583 F.2d 238, 241 (5th Cir. 1978); United States v. Smith, 521 F.2d 374, 376-77 (10th Cir. 1975); United States v. Martinez, 446 F.2d 118, 119-20 (2d Cir.), cert. denied, 404 U.S. 994

(1971). Indeed, in Contreras we stated both that the Allen charge given there was premature, and that we had "a profound feeling that it was coercive upon the jury." United States v. Contreras, supra, 463 F.2d at 774. This suggests that we did examine the charge "in its context and under all the circumstances" as required by Jenkins v. United States, supra, 380 U.S. at 446, although we did not directly say so. The brief per curiam opinion in Contreras does not reflect the factual basis of the "profound feeling that it was coercive upon the jury." The Allen instruction given in Contreras and the one given here are different, but we do not find that difference dispositive. We conclude that Contreras does not require reversal because, for the reasons set forth below, we hold that under all the circumstances the Allen charge given in this case, even if premature, was not coercive.

First, the charge given by the trial judge in this case contained all of the elements of the charge initially sanctioned by the Supreme Court in Allen.[1] Instructions admonishing jurors to reconsider their positions have "been consistently approved in

the Ninth Circuit when [they are] in a form not more coercive than that in Allen." United States v. Hardy, supra, 454 F.2d at 889. E.g., United States v. Moore, supra, 429 F.2d at 1306-07; Sullivan v. United States, supra, 414 F.2d at 717; Dearinger v. United States, supra, 378 F.2d at 348. We conclude that the instruction given here

> sufficiently reminded each of the jurors of his obligation to give ultimate controlling weight to his own conscientiously held opinion. There was nothing express or implied in that instruction which was more coercive in tendency than the language in the instruction approved by the Supreme Court in Allen.

Sullivan v. United States, supra, 414 F.2d at 718-19.

Second, the period of deliberation following the Allen charge was sufficiently long to permit jury members to reach a reasoned decision, based upon their individual perception of the evidence and the law. Here, no suspicion of coercion was raised by an immediate post-charge guilty verdict. We have considered the length of deliberation following an Allen charge as a significant factor in detecting coercion, United States v. Moore, supra, 429 F.2d at 1307, as have other circuits, e.g., United States v.

Robinson, 560 F.2d 507, 517-18 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978); United States v. DeStefano, 476 F.2d 324, 337 (7th Cir. 1973); United States v. Pope, 415 F.2d 685, 690-91 (8th Cir. 1969), cert. denied, 397 U.S. 950 (1970). While the time elapsed between charge and verdict is significant, it is not dispositive of the issue. It is but one of the total circumstances to be considered. The jury in this case, however, deliberated for three and one-half hours after the Allen charge before reaching a guilty verdict. By contrast, the jury in Contreras, where coercion was found, took only 35 minutes to find the defendant guilty after receiving its Allen charge.

Third, we cannot say that the total time of jury deliberation, approximately twelve hours, was so disproportionate to the task before the jury as to raise an inference that the Allen charge coercively produced the result. The time needed to reach a verdict is "best left to the trial judge," United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir.), cert. denied, 414 U.S. 873 (1973), and he apparently found it to be adequate.

Finally, neither Beattie nor the record reveals any indicia of coerciveness or pressure upon the jury. The instruction was not rendered in an atmosphere of judge and jury frustration over the jury's inability to break a deadlock among its members, nor was the judge aware of how the jury stood so as to suggest to the minority position jurors that he was speaking directly to them.

Thus, an examination of the instruction under all the circumstances reveals no coercion. Any prematurity of the instruction, therefore, could not be sufficient to warrant reversal. It is the rule of this circuit that the necessity, extent, and character of supplemental jury instructions is left to the sound discretion of the trial judge. United States v. Miller, 546 F.2d 320, 324 (9th Cir. 1976); Wilson v. United States, 422 F.2d 1303, 1304 (9th Cir. 1970) (per curiam). That discretion was not abused.

AFFIRMED.

FOOTNOTES

1. The Supreme Court approved instructions stating

> that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Allen v. United States, supra, 164 U.S. at 501.

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BROWNING, Circuit Judge, concurring:

The court adequately distinguishes our decision in United States v. Contreras, 463 F.2d 773 (1972), and I therefore concur.

However, to my mind, the instruction in this case approaches the limits of acceptability under the law of this circuit. A barely acceptable instruction, once sanctioned, tends to become the new norm. By this process an instruction of dubious merit continues to deteriorate.

The paramount problem is the threat of coercion -- a threat present even where, as here, the charge is found uncoercive "in its context and under all the circumstances" under Jenkins v. United States, 380 U.S. 445, 446 (1965). The line between admonishing the jury "simply....to keep trying," Walsh v. United States, 371 F.2d 135, 136 (9th Cir. 1967), and encouraging jurors to surrender their beliefs is extremely fine. If the charge is truly effective, it must follow that it is also truly dangerous. As Judge Goldberg has said, "The charge is used precisely because it works, because it can blast a verdict out of a jury otherwise unable to agree that a person is guilty," United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972).

The Allen instruction has been disapproved by three circuits. See United States v. Silvern, 484 F.2d 879 (7th Cir. 1973)(en banc); United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407 (1969). Many State courts, too, have abolished it or restricted its use. See, e.g., People v. Gainer, 139 Cal. Rptr. 861, 566 P.2d 997 (1977), and cases cited at n.8. For a recent resurvey of the objections to the charge, see Marcus, The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?, 43 Mo. L. Rev. 613 (1978).

If the charge is to be given, care should be taken that it be stated in the least objectionable form. The American Bar Association has suggested a form, to be given before the jury retires and repeated later if necessary, preferable to that used in this case:

> The verdict must represent the

considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Commentary to § 5.4 (1968). This form has been adopted in two Circuits,[1/] approved in substantially the same form in four others,[2/] and in my opinion could well be employed in the Ninth.

FOOTNOTES

1/ United States v. Silvern, 484 F.2d 879, 883 (7th Cir. 1973) (en banc); United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971).

2/ United States v. Angiulo, 485 F.2d 37 (1st Cir. 1973); United States v. Skillman, 442 F.2d 542 (8th Cir. 1971); United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969); Webb v. United States, 398 F.2d 727 (5th Cir. 1968).